

FINDING OF EMERGENCY

The Secretary of the Department of Food and Agriculture finds that an emergency exists. This regulation is being amended as an emergency regulation necessary for the immediate preservation of the general welfare, within the meaning of Government Code Section 11346.1.

Description of Specific Facts Which Constitute the Emergency:

The Department of Food and Agriculture has found that oak mortality disease (sudden oak death) caused by a fungus, *Phytophthora ramorum*, presents a clear and present danger to the native stands of oak and other trees, the nursery industry, other agricultural commodities and plant life (including ornamental plantings) of California. Section 3700 implements a program to arrest the artificial spread of the disease. Continued action is necessary to contain and minimize the destructive impact of this pest and disease at the earliest possible time. On April 9, 2004, the Administrator of the United States Department of Agriculture (USDA), Animal and Plant Health Inspection Services (APHIS) issued the first emergency order restricting the interstate movement of nursery stock from California nurseries located outside the area regulated under Section 3700.

On April 22, 2004, USDA, APHIS issued a new order that replaced that issued on April 9, 2004. On April 23, 2004, USDA, APHIS issued a clarification of its April 22, 2004 order. Through this last federal emergency order and its subsequent clarification, the USDA, APHIS identified additional plant species as regulated associated articles and as such, these associated articles are prohibited interstate movement from all California nurseries unless properly certified under the provision of the federal emergency order.

Since April 2004, the USDA, APHIS has issued a series of federal emergency orders that amended the articles regulated including on: 1) August 5, 2004, 2) December 21, 2004, 3) August 3, 2005, 4) September 14, 2005, and 5) November 15, 2005 (effective November 28, 2005). As a result, it was necessary to make emergency amendments to the State's regulation governing the intrastate movement of hosts and associated articles (nursery stock) with these federal orders. Without a parallel State regulation that is substantially the same as the federal domestic quarantine and related federal orders, the USDA cannot regulate less than the entire State.

On February 10, 2006, the USDA, APHIS again issued a new federal order that becomes

effective February 20, 2006. The USDA has deemed this action necessary due to:

- The identification of additional plant taxa that can be infected by *P. ramorum* and needs to be regulated as “associated hosts” in order to control the artificial spread of this disease.
- The completion of Koch’s postulates on three species resulting in moving those species from the USDA’s list of “plants associated with *P. ramorum*” to the USDA’s list of “proven regulated hosts.”
- Changes in some of the nomenclature and the need to stay current and to clearly communicate the USDA’s intent of what plants are regulated.

This federal order specifically affects the interstate movement of nursery stock from the States of Washington, Oregon, and California. Under authority of this order, nurseries operating under a compliance agreement may continue to ship “Hosts and Associated Plants” including these newly listed plants. Any other nurseries containing these newly listed associated plants must be properly inspected, sampled and tested and placed under a Compliance Agreement by February 20, 2006, to be able to move plants interstate.

This action is authorized by the Plant Protection Act of June 20, 2000, as amended, Section 412(a), 7 U.S.C. 7712(a), which authorizes the United States Secretary of Agriculture to prohibit or restrict the movement in interstate commerce of any plant, plant part, or article if the Secretary determines the prohibition or restriction is necessary to prevent the dissemination of a plant pest within the United States.

The February 10, 2006 federal order adds 13 new plant species to its revised “APHIS List of Hosts and Plants Associated with *Phytophthora ramorum* (Revision dated 3 February 2006).” This includes: *Abies magnifica* (red fir), *Acer davidii* (striped bark maple), *Ardisia japonica* (ardisia), *Euonymus kiautschovicus* (spreading euonymus), *Gaultheria shallon* (salal, Oregon wintergreen), *Hamamelis x intermedia* [(*H. mollis* & *H. japonica*) (hybrid witchhazel)], *Leucothoe axillaries* (fetter-bush, dog hobble), *Magnolia grandiflora* (Southern magnolia), *Michelia maudiae* (Michelia), *Michelia wilsonii* (Michelia), *Osmanthus decorus* [(=*Phillyrea decora*; =*P. vilmoriniana*)

(*Osmanthus*)], *Prunus lusitanica* (Portuguese laurel cherry) and *Rosa rugosa* (rugosa rose). These plants are not currently listed as regulated under Section 3700. Therefore, to ensure harmonization with the federal order, these plants are also being added to Section 3700(c) as “associated articles.”

Koch’s postulates were completed for the following three associated hosts: *Adiantum aleuticum* (Western maidenhair fern), *Adiantum jordanii* (California maidenhair fern) and *Rhamnus californica* (California coffeeberry). As a result, these plants were deleted from the “Plants Associated with *Phytophthora ramorum*” and added to the list, “Proven Hosts Regulated for *Phytophthora ramorum*.” The scientific names for two proven hosts were updated: *Frangula californica* [(=*Rhamnus californica*) (California coffeeberry)] and *Frangula purshiana* [(=*Rhamnus purshiana*) (cascara)]. Therefore, to ensure harmonization with the federal order, these changes are also being made to Section 3700(c).

The USDA has also refined six of its entries on the proven host list to clarify what it intends to be regulated, these include: *Pieris formosa* (and *P. formosa* x *P. japonica* and all hybrids of *P. formosa*) (Himalaya andromeda); *Quercus parvula* var. *shrevei* and all nursery grown *Q. parvula* (Shreve’s oak); *Viburnum plicatum* (doublefile viburnum); *Pseudotsuga menziesii* var. *menziesii* and all nursery grown *P. menziesii*; mountain andromeda (*Pieris floribunda* and *P. floribunda* x *P. japonica* and all hybrids of *P. floribunda*); and Japanese pieris (*Pieris japonica* and all hybrids of *P. japonica*). Therefore, to ensure harmonization with the federal order, these changes are being made to Section 3700(c). Under Section 3700(c), this had resulted in the following changes:

- 1) *Pieris formosa* (Himalaya pieris) has been changed to “*Pieris formosa* and *P. formosa* x *P. japonica* and all hybrids of *P. formosa* (Himalaya andromeda);”
- 2) *Quercus parvula* var. *shrevei* has been modified by adding “and all nursery grown *Q. parvula*,”
- 3) *Viburnum plicatum* var. *tomentosum* (doublefile) has been changed to “*Viburnum plicatum* (doublefile viburnum);”
- 4) *Pseudotsuga menziesii* var. *menziesii* has been modified by adding “and all nursery grown *P. menziesii*,”
- 5) Brouwer’s beauty andromeda (*Pieris floribunda* x *japonica*) has been changed to

“mountain andromeda (*Pieris floribunda* and *P. floribunda* x *P. japonica* and all hybrids of *P. floribunda*);

- 6) Forest flame andromeda (*Pieris formosa* x *japonica*) has been deleted from Section 3700(c);
- 7) Variegated and flaming silver andromeda (*Pieris japonica*) has been changed to “Japanese pieris (*Pieris japonica* and all hybrids of *P. japonica*);” and,
- 8) The deletion of *Pieris formosa* var. *forrestii* (Chinese pieris) and *Pieris formosa* var. *forrestii* x *Pieris japonica* (pieris) from Section 3700(c).

Finally, several changes are being made that clarify the common names of some of the hosts or potential carriers of the pathogen regulated under Section 3700(c) to ensure those affected in California understand what is regulated. These changes include:

- 1) The addition of “Scotch” to “heather” after *Calluna vulgaris*;
- 2) The deletion of “a” and addition of “California” to “honeysuckle” after *Lonicera hispidula*;
- 3) The addition of “California” to “black oak” after *Quercus kelloggii*; and,
- 4) The deletion of “arrowwood” and the addition of “Bodnant viburnum” after *Viburnum x bodnantense*.

Therefore, as the federal order became effective on February 20, 2006, the Department is proposing these emergency amendments to Section 3700(c) to continue to provide the necessary regulatory framework for a State program to continue to arrest the intrastate and interstate spread of this disease and be in compliance with the February 10, 2006 federal order.

The Department proposes to amend this regulation because it is necessary to continue to have authority for an established statewide program in order to arrest the artificial spread of the disease to additional areas and harmonize the State’s regulation governing the intrastate movement of nursery stock with the latest federal order that governs the interstate movement of California nursery stock. Immediate amendment of this regulation is necessary to mitigate the effects of this disease on the agricultural industry, which includes native tree stands. Additionally, it is necessary to immediately amend this regulation to avoid more stringent federal

restrictions being placed against the State to prevent the interstate movement of articles and commodities that may carry *Phytophthora ramorum*. Without the immediate implementation of this proposed regulatory action, the USDA, APHIS may consider the entire state as infested with *Phytophthora ramorum*, rather than just the current 14 regulated counties. If this were to occur, there would likely be additional detrimental quarantine requirements directed against California commodities by our international trade partners.

These facts and circumstances clearly indicate that the spread of oak mortality disease presents a clear and imminent danger to property and, therefore, constitutes an emergency. The Department is therefore compelled to take immediate action to mitigate the damage to property and preserve the general welfare.

The Department has determined that *Phytophthora ramorum* is a serious forest pest for which control is required to prevent further spread and harm to forests, parks, commercial and urban landscapes, and watersheds. This disease is known to occur in 14 California counties. Oak mortality disease is serious due to the fact that it kills tanoak, coast live oak, and black oak trees. The pest has been confirmed as infecting Shreve's oak and non-oak species such as rhododendron, huckleberry, bigleaf maple, California buckeye, California coffeeberry, manzanita, and toyon and other hosts causing foliar and stem disease symptoms.

The proposed emergency amendments of Section 3700(c) will establish new hosts and associated articles, eliminate some regulated articles by changing them to regulated hosts and clarify by scientific and/or common name what is regulated. To protect California's agricultural industry, it is necessary to immediately regulate movement of hosts and potential carriers that may transfer the pest from the infested area. Therefore, it is necessary to amend Section 3700(c) on an emergency basis.

Authority and Reference Citations

Authority: Sections 407, 5321 and 5322, Food and Agricultural Code.

Reference: Sections 24.5, 5321, and 5322, Food and Agricultural Code; Sections 11425.50 and 11440.10, Government Code; Section 1084 *et seq.*, Code of Civil Procedure.

Informative Digest

Existing law obligates the Department of Food and Agriculture to protect the agricultural industry in California and prevent the spread of injurious pests (Food and Agricultural Code, Sections 401 and 403). Existing law also provides that the Secretary may establish, maintain, and enforce such regulations as he deems necessary to prevent the spread of pests to protect California's agricultural industry (Food and Agricultural Code, Section 5322).

Section 3700. Oak Mortality Disease Control.

The proposed emergency amendment of Section 3700(c) will establish *Abies magnifica* (red fir), *Acer davidii* (striped bark maple), *Ardisia japonica* (ardisia), *Euonymus kiautschovicus* (spreading euonymus), *Gaultheria shallon* (salal, Oregon wintergreen), *Hamamelis x intermedia* [(*H. mollis* & *H. japonica*) (hybrid witchhazel)], *Leucothoe axillaries* (fetter-bush, dog hobble), *Magnolia grandiflora* (Southern magnolia), *Michelia maudiae* (Michelia), *Michelia wilsonii* (Michelia), *Osmanthus decorus* [(=*Phillyrea decora*; =*P. vilmoriniana*) (Osmanthus)], *Prunus lusitanica* (Portuguese laurel cherry) and *Rosa rugosa* (rugosa rose) as associated articles under the articles and commodities covered by the regulation. The effect of the changes to the regulation is to provide authority for the State to regulate movement of these new “associated hosts” and potential carriers of disease from the regulated area to prevent artificial spread of the pest to non-infested areas to protect California's agricultural industry and the environment.

Additionally, the amendments that are a result of clarifications of what is intended to be regulated will establish *Pieris formosa* (and *P. formosa* x *P. japonica* and all hybrids of *P. formosa*) (Himalaya andromeda); *Quercus parvula* var. *shrevei* and all nursery grown *Q. parvula* (Shreve's oak); *Viburnum plicatum* (doublefile viburnum); *Pseudotsuga menziesii* var. *menziesii* and all nursery grown *P. menziesii*; mountain andromeda (*Pieris floribunda* and *P. floribunda* x *P. japonica* and all hybrids of *P. floribunda*); and Japanese pieris (*Pieris japonica* and all hybrids of *P. japonica*) as regulated and delete specific reference to *Pieris formosa* var. *forrestii* (Chinese pieris) and *Pieris formosa* var. *forrestii* x *Pieris japonica* (pieris) from Section 3700(c).

The effects of these changes to the regulation are to clarify and consolidate what is intended to be regulated under Section 3700(c).

Finally, there were nonsubstantive changes made to the common names of *Calluna vulgaris*, *Lonicera hispidula*, *Quercus kelloggii*; and, *Viburnum x bodnantense*. The effect of these amendments is to clarify the common names as used by those affected by the regulation within the 14 counties regulated in California.

Mandate on Local Agencies or School Districts

The Department of Food and Agriculture has determined that Section 3700 does not impose a mandate on local agencies or school districts, except that the agricultural commissioner of a county under regulation has a duty to enforce it. No reimbursement is required under Section 17561 of the Government Code because the 14 affected agricultural commissioners requested that they be added to the regulation.

Cost Estimate

The Department has also determined that no savings or increased costs to any state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the State will result from the proposed action.